No. 85-1106

Supreme Court, U.S.
FILED
DEC 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

DAVID BRUCE SHANDLOFF and
AAQUILINO ANTONIO ORDONEZ,

Petitioners,

VS.

PEOPLE OF THE STATE OF
CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIAN J. O'NEILL
STEVEN M. SINDELL
1137 Second Street
Suite 106
Santa Monica, California 90401
(213) 451-5515

Attorneys for Petitioners

Lorraine Mitchell - Legal Briefs
732 E. WASHINGTON BOULEVARD
LOS ANGELES, CALIFORNIA 90021
TELEPHONE (213) 747-5631

CONTENTS REPRODUCED FROM FURNISHED PRETYPED COPY.

Questions Presented.

1. WAS THE PETITIONER DETAINED OR ARRESTED AND WAS HIS CONTENT VOLUNTARY?

This case arises out of a seizure of petioners and a search of their luggage at an airport. It presents this Court an opportunity to clarify the distinction between investigative detention and arrests. The case also addresses the voluntarines of a consent following a search and seizure.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents.....ii

Table of Authorities.....iii

Opinions Below.....2

Jurisdiction.....2

Constitutional Provision.....2

Statement of the Case.....3

Reason for Granting the Petition.....17

1. The Confinement of Petitioners Was So Intrusive It Was an Arrest, Not a Detention. Therefore, the Consent Was Invalid.....17

Conclusion.....23

INDEX TO APPENDICES

Appendix A. Opinion.....App. p. 1

Appendix B. Order. Review Denied.....29

Appendix C. United States Constitution, Fourth Amendment.....30

TABLE OF AUTHORITIES

Cases — Page

Florida v. Rodriguez
105 S.Ct. 308 (1984).....20, 22

Florida v. Royer
460 U.S. 491 (1983).....18, 21, 22

Hayes v. Florida
105 S.CT. 1643 (1985).....21

Reid v. Georgia
448 U.S. 438, 100 S.Ct. 2751 (1980).....18

United States v. Mendenhall
446 U.S. 544, 100 S.CT. 1870,
64 L.Ed. 2d 497 (1980).....17

United States v. Place
462 U.S. 696.....19, 21, 22

United States v. Sharpe
105 S.Ct. 1568 (1985).....17, 20, 22

Constitution and Statutes

California Health & Safety Code
Section 11352.....14

California Penal Code, Section 1237.5...14

28 U.S.C. 1254(1).....2

United States Constitution, Fourth
Amendment.....2, 30A

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No.

DAVID BRUCE SHANDLOFF and AQUINO ANTONIO ORDONEZ,

Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California

---

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

David Bruce Shandloff and Aquino Antonio Ordonez, by and through their attorney, petition for a writ of certiorari to review the judgment of the

Supreme Court of the State of California entered in the above-entitled case on October 24, 1985.

Opinions Below.

The published opinion of the Court of Appeals and the Summary Order denying review in the California Supreme Court are attached as Appendix A and Appendix B.

Jurisdiction.

The opinion of the California Court of Appeals was filed on July 22, 1985. The California Supreme Court Order denying a Petition for Hearing was filed on October 24, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Constitutional Provision.

United States Constitution, Fourth Amendment: [App. "C", infra, A].

Statement of The Case

On June 12, 1981, Los Angeles County Deputy Sheriff Gary Frederick was stationed on narcotics detail at Los Angeles International Airport. He monitored the arrival of a Pan American Flight from Miami, which he considered a source city. He utilized the "Drug Courier Profile" to observe the passengers. The profile is a compilation of abstract characteristics thought to be typical of persons carrying illegal drugs.

Petitioners Shandloff and Ordonez were observed exiting the crowded plane within a few seconds of each other by Deputy Frederick. He had no prior knowledge that either was involved in drug trafficing (C.T. 5-6).

Petitioner Ordonez walked to the top of an escalator. He took a path between

some chairs instead of the more direct main sidewalk. He walked separate and apart from Petitioner Shandloff to the escalator which he eventually descended. Prior to taking the escalator, Ordonez looked at Shandloff from a distance of fifty feet, but did not say anything to Shandloff (C.T. 8-9).

Petitioner Shandloff also took an indirect route to the escalator after he deplaned. He stopped several times and looked in all directions. Shandloff descended the escalator a few passengers behind Ordonez.

Both Petitioners met at the base of the escalator. Ordonez made the following statement to Shandloff, "I'll get the car, you get the baggage and suitcases" (C.T. 9-10). Ordonez then removed an envelope from his coat pocket and handed it to

Shandloff, who removed two airline tickets and handed the envelope back to Ordonez. Shandloff placed the tickets into his rear pants pocket and parted company from Ordonez (C.T. 9-10; R.T. 15-16). Shandloff was at this time suspected of being a "courier of contraband (C.T. 60-1). Ordonez proceeded out the front door to the sidewalk where Frederick lost sight of him (C.T. 10).

Petitioner Shandloff proceeded to the baggage area where he waited approximately ten minutes for baggage. Frederick followed Shandloff because he felt that some type of illegal activity which he wanted "to follow up on, due to the manner in which they were talking, the manner in which they were looking at the other individuals; also due to the fact of the whispering, low-toned voice, and also

coming from a source city: Miami" (R.T. 17).

While waiting for his baggage, Petitioner Shandloff was observed to pace back and forth, stop, look outside, shift his weight from one foot to another, perspire and continue to pace around the baggage carousel. After waiting approximately ten minutes, Shandloff retrieved four suitcases from the carousel. He removed the tickets from his pants pocket, put them in his mouth and removed the baggage claim stubs from the airline tickets (C.T. 11-12; R.T. 18-19).

During the entire time that Petitioner Shandloff was in the baggage area he was being surveilled by Deputy Frederick. After Shandloff retrieved the four suitcases, he stacked one on top of

the other, and placed two to either side of where he was standing.

Frederick, who at this time was "within two maybe three feet at most" from where the Petitoner was standing (C.T. 64), detected a "strong chemical odor" from the suitcases. He was unable to pinpoint the origin of the odor (R.T. 20), and he could not describe the odor other than to say that it was a "chemical odor" (C.T. 64).

Deputy Frederick had never received any training for the smell of cocaine (C.T. 65). He was not an expert in cocaine detection nor was he a chemist. Prior to the instant case, he had never prepared a report which indicated that he had smelled cocaine (C.T. 64-66).

Mr. Jay Williams, an expert forensic criminalist, testified on behalf of

Petitioners at the suppression hearing. He opined that there was no detectable odor of cocaine at the time the Petitioners were detained. The expertise of Williams, who had analyzed at least 7,000 samples of cocaine (C.T. 118) was not challenged by the Prosecution.

Upon detection of the alleged odor, Deputy Frederick approached Petitoner Shandloff and told him that he was a Deputy Sheriff, assigned to narcotics and that he "would like to talk to" him (R.T. 25). Frederick testified that Shandloff was only being questioned about his identity when he was intially detained. Shandloff was asked for indentification and his plane ticket. He produced his driver's license but stated that he did not have a plane ticket (R.T. 25-6). Frederick further testified that the

suitcases were not free to leave but that had Shandloff expressed the desire to leave he would have been free to do so.

Deputy Frederick left Petitioner Shandloff in the company of fellow officers at the point of the original detention and then proceeded to approach Petitioner Ordonez who was approximately fifty to seventy-five feet away and was returning from the parking lot (R.T. 27). By the time Frederick made contact, Ordonez was standing at a ticket counter for Eastern Airlines. Ordonez was not suspected of having committed a crime at this juncture (R.T. 31; C.T. 26-30). However, Frederick did believe that Ordonez was involved or acquainted with Shandloff.

Deputy Frederick informed Ordonez that he was conducting a narcotics

investigation, and asked Ordonez if he would mind talking to him. Ordonez stated, "No, I don't mind, what do you want?"

Petitioner Ordonez was brought over to the area where Petitioner Shandloff was being detained, and then both Petitioners were asked to accompany Frederick and the other officers to the Drug Enforcement Administration Office, which was located across the terminal, for further investigation.

Upon arrival at the office, the Petitioners were separated from one another. The four suitcases remained with Shandloff who was taken to a small room (20' x 20') where the luggage was eventually searched (C.T. 70).

While inside the small room, Shandloff was handcuffed to a chair.

Deputy Frederick told Shandloff that he was conducting a narcotics investigation and that he believed that there was contraband inside the suitcases. Frederick asked for permisson to open the suitcases. If he did not consent, he was told he would be prosecuted in federal court instead of state court and that a high bail would be imposed. After about a half hour of interrogation, he finally agreed to could open two of the four suitcases, but reminded Frederick that he did not pack them (R.T. 33-4).

Petitioner Shandloff then opened two of the four suitcases. Frederick observed Federal Express envelopes inside of the suitcases. There was no way to determine the contents of the envelopes without opening them. Frederick seized the envelopes from the two suitcases (R.T.

35), and without permission from anyone, opened them (R.T. 116). Contained within these Federal Express envelopes were plastic bags and inside the plastic bags were two thousand grams of cocaine (C.T. 50-51; R.T. 35).

Deputy Frederick then asked Petitioner Shandloff to open the remaining two suitcases. Shandloff replied that he could not in that they were not his. Both of these suitcases had name tags which bore the name of Petitioner Ordonez.

Frederick then went over to where Ordonez was seated and asked Ordonez about the suitcases (R.T. 36). Ordonez told Frederick that the suitcases were not his. When Frederick then asked Ordonez if he could "go into" them, Ordonez stated, "These bags are not mine, I have never

seen them before either" (C.T. 51-53; R.T. 36).

Deputy Frederick then proceeded to force open the remaining two suitcases (R.T. 37). Frederick found additional Federal Express envelopes inside of these suitcases. These envelopes were also seized and opened by Frederick without permission from either Petitioner. The envelopes contained an additional two thousand grams of cocaine (C.T. 53-55).

Various documents bearing the name "Shandloff" were found inside the first two suitcases. Various documents and items of identification bearing the name "Ordonez" were found inside of the second two suitcases (C.T. 56-7). After completing the search of the suitcases, Deputy Frederick arrested both Petitioners.

The Petitioners were charged in California Municipal Court with violating Health and Safety Code section 11352, transporting cocaine into the state.

The defendants moved in pretrial motions to suppress the evidence on the grounds that the search and seizure violated the Fourth Amendment. The motions were denied on September 9 and December 5, 1983.

On February 7, 1984, the Petitioners pleaded guilty to a violation of Health and Safety Code section 11352 (RT 202-213; CT 403-404). They were allowed to appeal the denial of the suppression motions pursuant to California Penal Code §1237.5. On May 30, 1984, petitioners were sentenced to three years in state prison. Both petitioners filed timely Notices Of

Appeal (RT 214; CT 405-414). They have remained free on bail pending appeal.

Petitioners' appeals to the California Court of Appeal, Second District, were denied on July 22, 1985. People v. Shandloff, 170 Cal.App.3d 372 (1985).

The court found objective, articulable facts which justified the detention. The court held that "something more" than a drug courier profile is necessary to justify a detention. The court found the "something more" in a chemical odor emanating from the defendant's suitcase, their contradictory statements, and their conduct. The court also found that the defendant's consented to the search.

The defendants petitioned the California Supreme Court for review of the

decision of the Court of Appeal. On October 24, 1985, the California Supreme Court denied review on both petitions.

REASONS FOR GRANTING THE WRIT.

1. The Confinement of Petitioners Was So Intrusive It Was an Arrest, Not a Detention. Therefore, the Consent Was Invalid.

This Court has candidly conceded that its decisions ". . . create difficult line-drawing problems in distinguishing an investigative stop from a de facto arrest". United States v. Sharpe, 105 S.Ct. 1568, 1575 (1985). This petition presents the Court with an opportunity to clarify the law concerning airport searches and detentions.

A series of Supreme Court decisions seemingly disapproved of the use of "drug courier profiles" to detain persons at airports. In United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), a defendant was stopped at an

airport because her behavior fit the profile. A plurality of the Court upheld the search. However, a majority of the Justices who reached the issue disapproved of the profile.

In Reid v. Georgia, 448 U.S. 438, 100 S.Ct. 2751 (1980), a detention and arrest based on the drug courier profile was struck down by this Court. The arresting officers monitored a flight from a source city. The defendants fit the profile and were detained. This Court held that the drug courier profile was not a sufficient basis to detain the suspects.

The Court has also held that seizures of suspected drug couriers at airports were arrests, not detentions. In Florida v. Royer, 460 U.S. 491 (1983), police observed a suspect who fit the profile. The suspect was approached at the airport

by detectives who asked to see his driver's license and airline ticket. They then asked him to accompany them to a small room and they retrieved his luggeage. The suspect unlocked the suitcases and was arrested when drugs were found. This Court held that Royer was under arrest before he consented to the search. The evidence was suppressed because the consent was tainted by the illegal detention.

Similarly, in United States v. Place, 462 U.S. 696, the Court held that that an investigative seizure of defendant's luggage for 90 minutes "precludes the conclusion that the seizure was reasonable in the absence of probable cause."

However, other recent Supreme Court decisions appear to have overruled, or at least undermined, the above decisions. In

Florida v. Rodriguez, 105 S.Ct. 308 (1984), this Court upheld a baggage search at an airport. A suspect attempted to flee when he spotted police officers. He gave contradictory answers when questioned. He then gave the police consent to search the baggage and cocaine was found.

The Florida trial court suppressed the evidence. The Supreme Court reversed and held that the initial contact between the officers and the suspect was a consensual encounter that implicated no Fourth Amendment interest. The defendant's conduct and answers provided an "articulable suspicion" which justified the seizure.

Similarly, in United States v. Sharpe, 105 S.Ct. 1568 (1985), this Court held that in assessing whether a detention

is too long in duration to be justified as an investigative stop, it is appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly. See Hayes v. Florida, 105 S.Ct. 1643 (1985).

Analysis of the instant case pursuant to the above decisions reveals the confusion in the Court's rulings. Pursuant to United States v. Royer, supra, and United States v. Place, supra, the consent was invalid because the petitioners were arrested without probable cause. Petitioner Shandloff was initially detained because he fit the druq courier profile. He was then transported to a small room, handcuffed to a chair for about a half hour and interrogateed. His luggage was also detained. He was not

free to leave. Petitioner Ordonez was similarly confined simply because he was seen with Shandloff.

Since the confinement of petitioners was far more offensive than the confinement of either Royer or Place, it should follow that the their consent was not voluntary and the evidence be suppressed.

However, a contrary result is arguably mandated by Florida v. Rodriquez, supra, and United States v. Sharpe, supra. Those cases hold that detentions similar to the one here are valid while the officer pursues his investigation. It is thus apparent that considerable confusion remains over the distinction between investigatory detentions and arrests despite the abundance of decisions addressing that issue.

Conclusion.

For the foregoing reason, this Court should grant certiorari in this case to settle the distinction between investigatory detentions and arrests.

Respectfully submitted,

BRIAN J. O'NEILL

By STEVEN M. SINDELL,

Attorneys for Petitioners

December 23, 1985

APPENDIX A

APPENDIX A.

Opinion.

California Court of Appeal, Second Appellate District, Division Four.

The People of the State of California, Plaintiff-Respondent, -vs- David Bruce Shandloff and Aquilino Antonio Ordonez, Defendants and Appellants. Crim. No. B005743. Super. Ct. No. A 198975.

Filed July 22, 1985.

Appeals from the Superior Court of Los Angeles County. Edward A. Hinz, Jr., Judge. Affirmed.

Steven M. Sindell, for Defendant and Appellant Shandloff.

Hecht, Diamond & Greenfield, and Roger Jon Diamon, for Defendant and Appellant Ordonez.

John K. Van De Kamp, Attorney General, Carol Wendolin Pollack, and

Christine C. Franklin, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants, David Bruce Shandloff (Shandloff) and Aquilino Antonio Ordonez (Ordonez), pleaded guilty to a violation of Health & Safety Code section 11352, transporting cocaine into the state, after denial of their motions to suppress evidence pursuant to Penal Code section 1538.5. Each was sentenced to a three-year state prison term. Appellants appeal from the denial of their suppression motions.

FACTS[1]

On June 12, 1981, Deputy Gary Fredericks of the Los Angeles County Sheriff's Department was assigned to

---

[1]The appellants' and People's counsel stipulated that the preliminary hearing transcript be incorporated into the record for purposes of the suppression motions.

narcotics invstigation and was monitoring a Pan Am flight from Miami to Los Angeles International Airport due to arrive at about 10:30 a.m.

Deputy Fredericks, another deputy sheriff and four United States Drug Enforcement Administration agents were present and all were in plain clothes when the flight arrived. Deputy Fredericks had made numerous arrests of drug couriers arriving on flights from Miami, which was known to him as a source city for cocaine and marijuana.

Deputy Fredericks saw Ordonez deplane first, carrying no luggage. A few seconds and about 10 to 12 passengers later, Shandloff disembarked. Only Ordonez and Shandloff appeared to walk separately from the crowd, though they did not walk together. Shandloff stopped several times

and looked around in all directions. As the two appellants walked toward the top of the escalator and were about 50 feet apart, they appeared to look at each other.

Appellants met at the bottom of the escalator where Ordonez said to Shandloff, "I'll get the car. You get the baggage and the suitcases." At that point, Ordonez handed Shandloff an envelope that he had removed from his pants pocket. Shandloff took what appeared to be two airline tickets from the envelope and handed ti back to Ordonez. Then the two separated again.

Shandloff put the airline tickets in his rear pants pocket and proceeded to the baggage claim area. In the 10 minutes it took for the baggage to arrive, Fredericks observed Shandloff pace back and forth, look outside, shift his weight from one

foot to another and perspire heavily, though it was not particularly hot inside the baggage claim area.

Shandloff removed four suitcases from the baggage carousel and removed baggage claim stubs from the tickets Ordonez had given him.

As Deputy Fredericks positioned himself near Shandloff and the four suitcases, he detected what he described as a "strong chemical odor" coming from the suitcases. He bent down to get a better smell and concluded that the odor seemed to emanate from all four suitcases.

Although Deputy Fredericks testified at the preliminary hearing that he had smelled that same odor in connection with cocaine on two prior occasions, his testimony at the suppression hearing was that he had detected the same odor

numerous times in the course of about 40 separate cocaine seizures in the preceding year and a half but that the two occasions he had testified to earlier were the only ones in the preceding six months where the smell had been as strong. Based upon this odor, after having observed the behavior of appellants after deplaning, Deputy Fredericks formed the opinion that the suitcases contained cocaine.

Deputy Fredericks followed Shandloff and the suitcases out of the terminal to the sidewalk, where Shandloff set the suitcases down and appeared to wait for someone.

At that point, Deputy Fredericks approached Shandloff, showed him his badge, told him he was with the sheriff's department and was conducting a narcotics investigation, and asked if he would mind

talking to him. Deputy Fredericks did not display his weapon or touch Shandloff. Shandloff responded, "No, I don't mind. What can I do?"

Deputy Fredericks advised him that he felt that there might be contraband in the suitcases because of the strong chemical odor emanating from them.

Shandloff responded that he was carrying the suitcases to Los Angeles for someone and that someone else had packed the suitcases with his things. When Deputy Fredericks asked Shandloff to produce identification, Shandloff complied but stated that he had lost his airline tickets.

Just then, Ordonez was walking back towards the terminal in Shandloff's direction from an adjacent parking lot but apparently saw Shandloff with Deputy Fredericks and went into the terminal.

As Deputy Fredericks caught up with him, Ordonez was standing at an airline ticket counter. The deputy told Ordonez he was conducting a narcotics investigation, and he displayed his badge. He asked if Ordonez would mind talking to him, to which Ordonez responded, "No, what can I do?" Although Deputy Fredericks requested some identification from Ordonez, Ordonez did not produce any. In response to Deputy Fredericks' question as to his purpose at the airport, Ordonez stated that he had just come to the airport to check on a San Francisco flight. When Deputy Fredericks asked him if, to the contrary, he had just arrived on a flight from Miami, Ordonez answered, "No, I just drove here to the airport to check on a San Francisco flight." Ordonez then agreed to go with Deputy Fredericks to where Shandloff was.

Deputy Fredericks, appellants with their suitcases, and the other law enforcement officers then walked to the drug enforcement administration's office at the airport where the appellants were separated, with Ordonez going into one room and Shandloff and the suitcases going into another.

When Deputy Fredericks asked Shandloff if he could open the suitcases, Shandloff told Fredericks that he could open two them but to remember that he did not pack them. However, instead of Deputy Fredericks opening the two suitcases, Shandloff opened them. Deputy Fredericks then observed and recovered narcotics paraphernalia and a number of sealed mailing envelopes that, when they were opened, were found to contain a white powdery substance resembling cocaine.

When Deputy Fredericks then asked if he could open the other two suitcases, Shandloff responded, "They're not mine, but you can open them." Before he opened the suitcases, Deputy Fredericks observed name tags on them bearing the name Ordonez. He then pried open the two suitcases and found their contents to be similar to the first two suitcases. He then arrested appellants.

CONTENTIONS

Both appellants contend: (1) that the trial court erred prejudicially in concluding that there was probable cause to detain them; (2) that the search and seizure of the suitcases violated the federal and state Constitutions; and (3)

//

//

//

that the scope of the search exceeded the scope of the consent.[2]

Additionally, Shandloff contends that any consent to search was invalid as it was a mere submission to authority.

DISCUSSION

1. Detention of the Suspects

"The law is well-established that 'in order to justify an investigative stop or detention the circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity. Not only must he subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so: the facts must be such as would

---

[2]As the seizures in this case occurred prior to the effective date of Proposition 8, the "Victims' Bill of Rights" (Cal. Const., art. I, § 28, subd. (d)), its "truth-in-evidence" provision does not apply here. (People v. Smith (1983) 34 Cal.3d 251.)

Accordingly, Ordonez can assert Shandloff's constitutional rights. (Kaplan v. Superior Court (1971) 6 Cal.d 150.)

cause any reasonable police officer in a like position, drawing when appropriate on his training and experience (People v. Superior Court (Kiefer) [1970] 3 Cal.3d [807,] 827 [91 Cal.Rptr. 729, 478 P.2d 449, 45 A.L.R.3d 559]), to suspect the same criminal activity and the same involvement by the person in question. The corollary to this rule, of course, is that an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith. (Terry v. Ohio [1968] 392 U.S. [1,] 22 [20 L.Ed.2d (889,) 906-907 (88 S.Ct. 1868(].)' (In re Tony C., supra, 21 Cal.d at p. 893, fn. omitted; see also Reid v. Georgia (1980) 448 U.S. 438, 440 [65 L.Ed.2d 890, 893, 100 S.Ct. 2752]; Brown v. Texas (1979) 443 U.S. 47, 51 [61 L.Ed.2d 357, 362, 99 S.Ct. 2637].)

"An appellate court's review of a motion to suppress evidence is also governed by well-settled principles. The trial court's factual findings relating to the challenged search or seizure, 'whether express or implied, must be upheld if hey are supported by substantial evidence.' (People v. Lawler (1973) 9 Cal.3d 156, 160 [107 Cal.Rptr. 13, 507 P.2d 621].) '"The trial court also has the duty to determine whether, on the facts found, the search was unreasonable within the meaning of the Constitution." (Ibid.) Because "that issue is a question of law," the appellate court is not bound by the substantial evidence standard in reviewing the trial court's decision thereon. Rather . . . in such review it is "the ultimate responsibility

of the appellate court to measure the facts, as found by the trier, against the constitutional standard of reasonableness." (Ibid.) On that issue, in short, the appellate court exercises its independent judgment.' (People v. Leyba (1981) 29 Cal.3d 591, 597 [174 Cal.Rptr. 867, 629 P.2d 961], fn. omitted, quoting People v. Lawler, supra, 9 Cal.d at p. 160.)"

(People v. Lowen (1983) 35 Cal.3d 117, 123.)

The trial court below found that the investigatory stop of appellants was a "detention" and, therefore, permissible only if the police had an "objective, articulable basis" for suspecting them of criminal conduct. (See Wilson v. Superior Court (1983) 34 Cal.3d 777, 784.)

Appellants argue that the odor emanating from their luggage could not properly form part of the basis for such an objective, articulable suspicion because (1) their privacy rights were

violated and (2) the investigating police officer lacked the requisite expertise as to chemical odors. We disagree.

On the subject of privacy rights involving the escaping smell of contraband, the California Supreme Court has stated the rule as follows:

"In our view, the escaping smell of contraband from luggage may be likened to the emanation of a fluid leaking from a container. The odor is detectable by the nose, as the leak is visible to the eye. We discern no constitutionally significant difference in the manner of escape, and conclude that any privacy right is lost when either escapes into the surrounding area." (People v. Mayberry (1982) 31 Cal.d 335, 342.) Even the objection stated in the dissent to Mayberry, that "'A rose by any other name would not make

this a "plain smell" case'" (Id., at p. 343.) would have no validity here because it was a police officer's rather than a dog's nose, as in Mayberry, that detected the chemical odor.

Thus, the officer's smelling of the area immediately surrounding the suitcases was not a search and didnot violate the privacy rights of appellants.

As to appellants' contention that Deputy Fredericks lacked expertise as to drug odors, this contention lacks merit. Deputy Fredericks' prior experience with the same odor associated with cocaine was sufficient to arouse a reasonable suspicion here. (See People v. Lilienthal (1978) 22 Cal.3d 891, 898-899; People v. Briggs (1976) 62 Cal.App.3d 817, 821.) Deputy Fredericks testified that the odor he detected emanating from the luggage was

the same odor he had smelled numerous times over the course of approximately 40 different cocaine seizures in which he was involved during the preceding year and a half.

We next turn to appellants' contention that the officer's observations of them under the circumstances were insufficient to arouse an objective, articulable suspicion that they were engaged in criminal activity.

Recent cases analyzing confrontations -- whether "consensual encounters" or "detentions" -- between law enforcement officers and suspected drug couriers at major international airports, "where . . . reasonable privacy expectations are of significantly lesser magnitude" (Florida v. Royer (1983) 460 U.S. 491, 515, quoted in Florida v. Rodriguez (1984) 83 L.Ed.2d

165, 161), focus on the observed behavior of the suspects in relation to a number of behavioral characteristics associated with known drug couriers. Some of these behavioral characteristics appear in what is known as the "drug courier profile"[3] while others simply have been derived from the past observations of individual law enforcement officers.

In Wilson v. Superior Court (1983) 34 Cal.3d 777, relied upon by appellants here, the California Supreme Court held that mere "eye contact" between a suspected drug courier and a plain clothes officer could not justify a detention

---

[3]The "drug courier profile," which appellants claim was relied upon here, has been described as "a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics." (Reid v. Georgia (1979) 448 U.S. 438, 440.)

where the officer conceded that "he could not articulate any objective basis for differentiating the 'eye contact' of drug couriers from that of other persons" even though such eye contact was consistent with the behavior of persons he had previously arrested for transporting narcotics. (Id., at pp. 780-781.)

Similarly, mere conformance of the observed behavior of the courier suspects with the so-called "drug courier profile" has een held to be insufficient to form the basis of an objective, articulable suspicion where: (1) the suspects arrived rom a known source city of cocaine trafficking; (2) they arrived in the early morning when law enforcement activity was diminished; (3) they appeared to conceal the fact that they were traveling together; and (4) they appeared to have no

luggage other than their shoulder bags. (Reid v. Georgia, supra, 448 U.S. 438, 440-441.) In Reid, the United States Supreme Court found that, of the evidence relied on, "only the fact that the petitioner preceded another person and occasionally looked backward at him as they proceeded through the concourse relates to their particular conduct." (At p. 441.) The remainder of the articulated circumstances were found by the court to "describe a very large category of presumably innocent travelers." (Id., at p. 441.)

In contrast, the United States Supreme Court in Florida v. Rodriguez, supra, 83 L.Ed.2d 165, recently found that suspects who, before they were confronted, (1) had spoken furtively to one another after spotting the plain clothes officers,

and one of whom had advised the others to "get out of here," (2) attempted to evade the officers, and (3) made contradictory statements concerning their identities were justifiably detained on the basis of an articulable suspicion. The only reference by the court to the association between the suspects' behavior and the behavior of known drug couriers was in the acknowledgment that the officer who made the observations "had special training in narcotics surveillance and apprehension." (Id., at p. 171.)

Thus, the relevant recent cases dealing with the issue indicate that something more than observed behavioral characteristics of courier suspects consistent with those of known drug couriers may be necessary in order for the totality-of-the-circumstances to give rise

to an objective, articulable suspicion of criminal activity that will justify a detention. Here, the "something more" consisted of the strong chemical odor emanating from the suspects' suitcases in the airport baggage claim area, Shandloff's contradictory statement concerning his possession of airline tickets, Ordonez' contradictory statements about his purpose and manner of arrival at the airport, and Ordonez' apparent efforts to evade the officers.

Appellant Shandloff contends, however, that the trial court erred in finding that there was a detectable odor emanating from the suitcases at the time he was detained. In support of this contention, he cites the expert witness testimony of Jay Williams, a senior criminalist with the Ventura County

Sheriff's Department laboratory, in which Williams stated his opinion that cocaine itself has no odor. However, Williams also testified that an odor might be present in cocaine as a result of some impurity in the cocaine or an additive, if wet, and Williams acknowledged that the slight odor he detected at trial could have been much stronger two years earlier if it had come from inside the mailing package, and if it were not wrapped in plastic. In the face of such equivocal testimony, the trial court was entitled to believe Deputy Fredericks' testimony and conclude from all of the evidence that such an odor indeed was present at the time of Shandloff's detention. (See People v. Smith (1972) 26 Cal.App.3d 404, 409.)

We, therefore, concur with the trial court's finding that the detention of the suspected drug couriers here was justified.

2. Scope of Consensual Search

Appellants' contention that the investigating officers exceeded the scope of the consent to search the suitcases when they opened sealed mailing envelopes inside the suitcases lacks merit.

The trial court found that the investigating officers "obtained appropriate consent as to the luggage" and that they "properly followed the proscriptions and rules and regulations of the Fourth Amendment and associated decisions."

We first address the issue of whether the consent was voluntary.

"The question of the voluntariness of consent is one of fact, to be determined by the trial court. The trial court's finding must be upheld if supported by substantial evidence. [Citations.] [¶] . . . [¶] The People had the burden of proving that defendant's manifestation of consent was the product of his free will and was not a mere submission to an express or implied assertion of authority. (People v. Johnson (1968) 68 Cal.2d 629, 632.)" (People v. Williams (1980) 114 Cal.App.3d 67, 71.)

Deputy Fredericks testified that, prior to asking appellants for permission to search the suitcases, appellants were asked if they would accompany the plain clothes officers across the terminal to their office, which they agreed to do; appellants were not promised anything or

threatened as an inducement to cooperate; no weapons were drawn at any time; Shandloff appeared agreeable but nervous, and Ordonez appeared very calm and cool. Upon their arrival at the security office, the two appellants were separated from each other with Shandloff being shown into a room with the suitcases. When the officers asked if they could search the suitcases, Shandloff said they could search two of the four that were his and Shandloff himself proceeded to open the two suitcases. Even after the officers observed and removed the sealed mailing envelopes from the suitcases, Shandloff did not object or withdraw his consent. Instead, after the officers opened the envelopes and asked if they could look in the two remaining suitcases, Shandloff said "you can go ahead and open them,"

although he told the officers they were not his. Before opening them, Deputy Fredericks observed name tags on them bearing the name of Ordonez. At that point, Deputy Fredericks proceeded to the area where Ordonez was seated and asked him if the suitcases were his, to which Ordonez responded that they were not.

On the basis of this testimony, we believe that the People met their burden on the consent issue, and that substantial evidence supported the conclusion that the consent was voluntary.

Once the voluntary consent to search the suitcases was given, without any limitation or attempts to revoke the consent, the officers were authorized to search all of the compartments and containers within the suitcases.

In People v. Williams, supra, 114 Cal.App.3d 67, wehre the court held that the scope of consent to search an automobile included closed brown bags and envelopes in its trunk, the court explained: "Had the defendant wished to limit the scope of the search, he should have done so. We believe that the defendant intended, and the officer understood, that the consent encompassed the vehicle in its entirety including its contents. To hold otherwise would require an extended and potentially confusing colloquy between the officer and the subject in an effort to isolate the precise areas of the automobile to which the consent to search extended. We do not believe that the Fourth Amendment requires anything more than the defendant's voluntary consent to the search of

property under his control." (Id., at pp. 73-77.)

Such observations apply with even greater force here because Shandloff had been told previously that the officers suspected the suitcases contained narcotics and could thus anticipate their desire to open any containers found inside. (See People v. Johnson (1980) 108 Cal.App.3d 175, 180.) Nevertheless, Shandloff at no time attempted to revoke or limit his consent.

The record thus supports the trial court's conclusion that the consensual search was proper.

DISPOSITION

The judgments are affirmed.

CERTIFIED FOR PUBLICATION

ARGUELLES, J.

We concur: WOODS, P.J., McCLOSKY, J.

APPENDIX B

APPENDIX B

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

OCT 24 1985

I have this day filed Order:

REVIEW DENIED.

In re: No. B005743

PEOPLE vs. DAVID BRUCE SHANDLOFF.

Respectfully,

Clerk

APPENDIX C

APPENDIX C.

United States Constitution, Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.